Internal Revenue Service

memorandum

CC:EL:GL:BTI:SBwatson
GL-118551-97

date: December 23, 1997

to: Chief, Case Processing, Oversight and Assistance C:TA:C

from: Deputy Assistant Chief Counsel (General Litigation) CC:EL:GL

subject: [redacted] Request for Technical Advice

We are responding to your request for technical advice with respect to the above taxpayer. By letter of July 31, 1997, Congressman David L. Hobson forwarded the inquiry of his constituent, [redacted]. [redacted] states that she relied on written advice from the District Director, [redacted], with respect to the attempted sale of her residence in [redacted]. She was unable to complete the sale because a federal tax lien against her ex-husband, [redacted], attached to the property.

Congressman Hobson previously contacted the [redacted] District Taxpayer Advocate by letter of July 14, 1997. On August 12, 1997, the district director responded by informing Congressman Hobson that the federal tax lien attached to the property. As will be explained more fully below, this was contrary to the advice [redacted] had previously received. Congressman Hobson is now raising the issue of whether the taxpayer can rely on written advice and whether the Service must honor that advice. The Service claims that it did not have all the pertinent facts at the time the district gave the advice to the taxpayer.

The Service assessed taxes against [redacted] for [redacted] on [redacted], in the total amount of $[redacted] and filed a notice of federal tax lien on [redacted] and her ex-husband bought the property in question on [redacted], and held title jointly during the marriage. [redacted] sent a letter to the district dated February 5, 1996, noting that she had received a divorce on [redacted]. Based on [redacted] letter, [redacted] of the local Special Procedures function ("SPf") informed [redacted] by letter of March 6, 1996, that she qualified as a purchaser under [redacted] law and concluded that [redacted] did not have an interest in the property at the time to which the federal tax lien could attach. [redacted] recorded a certified copy of her divorce decree on [redacted].

The issue is whether [redacted] had a sufficient interest in the real property that would qualify as "property or rights to property" under I.R.C. § 6321 to which the federal tax lien could attach. State law determines whether a taxpayer has an interest in property to which the federal tax lien can attach. United States v. Aquilino, 363 U.S. 509 (1960). Once a state law interest in property has been determined, federal law determines the consequences of the attachment of the federal tax lien and whether it has priority over competing interests. United States v. City of New Britain, 347 U.S. 81, 86 (1964).

United States v. Ray 90-2 U.S.T.C. ¶ 50,415 (S.D. Ohio 1990), is instructive with regard to the transfer of property interests when property is awarded to a spouse in a divorce action. The court in Ray found that the taxpayer's divorce decree did not have specific words of vesting and, therefore, did not divest the taxpayer of an interest in the property and the federal tax lien attached. Like the decree in the Ray case, the [redacted] divorce decree did not specifically include words of conveyance divesting [redacted] title and vesting it in [redacted].

The divorce decree did award the marital home to [redacted] and provided that [redacted], a joint owner, should execute a deed sufficient to convey his entire interest to [redacted]. The decree also provided a remedy in the event [redacted] refused to execute a deed. The decree provided that [redacted] could obtain a certified copy of the divorce decree and, accompanied by a legal description of the property, use it to "effectuate the transfer of any interest held by the non-complying spouse consistent with this decree." Therefore, until she did so on [redacted], [redacted] had an interest in the property to which the federal tax lien attached.

Though [redacted] claims that she relied on the written information transmitted to her by the district office, her reliance did not affect [redacted] property interest. By the time she recorded the certified copy of the divorce decree, the Service had made the assessment, filed the notice of federal tax lien, and the lien attached to the property in question. The Congressman's letter suggests, however, that equitable estoppel might apply in this case. As explained below, we conclude that it does not apply here.

The traditional elements required to invoke equitable estoppel are a definite misrepresentation by one party, intended to induce some action in reliance, and which does reasonably induce action in reliance by another party to his or her detriment. Heckler v. Community Health Services, 467 U.S. 51, 59 (1984); United States v. Varani, 780 F.2d 1296, 1304 (6th Cir. 1986).

Additionally, a higher standard is required to impute equitable estoppel to the government. Office of Personnel Management v. Richmond, 496 U.S. 414, 419 (1990); United States v. River Coal Co., Inc., 748 F.2d 1103, 1108 (6th Cir. 1984) (ordinarily the United States is not estopped by acts of individual officers and agents); Housing Authority of Elliott County v. Bergland, 749 F.2d 1184, 1190 (6th Cir. 1984) (equitable estoppel generally is not available against the government). If available at all, it will apply against the government "only in the most extreme circumstances." Gibson v. Resolution Trust Corp., 51 F.3d 1016, 1025 (11th Cir. 1995). At a minimum, some affirmative misconduct by a government agent is required as a basis of estoppel. Office of Personnel Management supra, 496 U.S. at 421; River Coal Co. Inc., 748 F.2d at 1108. Clearly there has been no affirmative misconduct in this case.

It is also clear that [redacted] did not rely to her detriment on the statements of [redacted] in his March 6, 1996, letter. The federal tax lien arose on [redacted], and the notice of federal tax lien was filed on [redacted]. At that time, [redacted] still had an interest in the property to which the federal tax lien attached before [redacted] effected a transfer of the property much later on [redacted].

We have also analyzed I.R.C. § 6404(f) entitled Abatement of Any Penalty or Addition to Tax Attributable to Erroneous Written Advice by the Internal Revenue Service, to determine whether it has any applicability to [redacted] situation. Since the Service has not assessed any penalties or additions to tax against [redacted], we believe that section 6404(f) does not apply.

We regret any difficulty that [redacted] may have experienced as a result of the attachment of the federal tax lien to her property. We suggest that [redacted] discuss the matter further with [redacted] District Counsel, who is familiar with this case. Some options may be available pursuant to I.R.C. § 6325(b) regarding discharge of the lien from the property.

Susan Watson is handling the case in this office. Please call her at 202-622-3610 if you have any questions.

PETER J. DEVLIN